

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA L. McCULLOCH

Claimant

VS.

DILLON COMPANIES, INC.

Respondent

Self-Insured

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Docket No. 217,405

ORDER

Respondent appeals from the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 29, 1999. Oral argument was held before the Board in Topeka, Kansas, on July 14, 1999.

APPEARANCES

Claimant previously settled her dispute with the respondent and, therefore, did not appear. Respondent, a self-insured, appeared by its attorney, Scott J. Mann of Hutchinson, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Marvin R. Appling of Wichita, Kansas. There were no other appearances.

ISSUES

The issues are described by respondent as follows:

- (1) Did claimant's accidental injury arise out of and in the course of her employment with respondent?
- (2) Was notice timely given?
- (3) Is the Kansas Workers Compensation Fund liable for, and is the respondent entitled to reimbursement for, medical expenses and temporary total disability benefits paid to or on behalf of the claimant by respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The general issue in this case is whether respondent is entitled to reimbursement from the Kansas Workers Compensation Fund under K.S.A. 44-534a(b). That statute requires the Fund to reimburse an employer for amounts paid either voluntarily or pursuant to preliminary

order when, after a full hearing on the claim, it is determined the employer did not owe the benefits. Respondent contends it did not owe the benefits because claimant did not suffer accidental injury and did not give notice. The ALJ denied respondent's request for reimbursement after finding respondent did owe the benefits paid. On appeal the Board finds, as explained more fully below, the ALJ had no jurisdiction over these issues because the case had previously been settled.

This matter proceeded to preliminary hearing before Administrative Law Judge Barnes on December 11, 1996. At the preliminary hearing, respondent denied claimant suffered accidental injury arising out of and in the course of employment and denied claimant gave timely notice as required by K.S.A. 44-520. Judge Barnes ruled in claimant's favor on both issues and respondent appealed. On March 24, 1997, the Board affirmed the ALJ's decision, finding, on a preliminary basis, claimant had proven that she did suffer accidental injury arising out of and in the course of employment and finding claimant gave timely notice.

On December 5, 1997, respondent and claimant settled the claim. Respondent had impleaded the Kansas Workers Compensation Fund on December 4, 1997, and the Fund was represented at the settlement hearing. The settlement documents reflect respondent paid approximately \$24,000 in medical expenses and approximately \$14,000 in temporary total disability benefits. Respondent also paid an additional lump sum of \$9,500.

At the settlement hearing, the special administrative law judge stated that claimant admitted she did not suffer accidental injury and did not give timely notice:

We're here in Docket No. 217,405. It's a work comp settlement. It involves an injury that's alleged to have occurred September 2, 1996, including all dates of employment and all injuries up through claimant's last day of employment. It all occurred in Sedgwick County. The worksheet shows the average weekly wage, the compensation that's already been paid, and the medical evidence presented, and the medical that's been paid. The settlement is a strict compromise. For the purpose of settlement, it's acknowledged that the claim was not timely filed and that it didn't arise out of work. The proposed settlement's for \$9,500.00. That's a lump sum. It's intended to resolve all issues and act as a full and final release. Claimant [*sic*] will pay all medical through today's date.

After the settlement, respondent requested a regular hearing. At the hearing, held September 9, 1998, respondent introduced the settlement documents and requested an order finding that respondent did not owe the benefits previously paid. No new testimony was offered. Respondent relied on statements at the settlement hearing that claimant agreed there was no accident and no timely notice. The ALJ then issued the order that is the subject of this appeal. But based on the evidence from the preliminary hearing, the ALJ found claimant did suffer a compensable injury and did give timely notice. In addition, the ALJ's order denied respondent's request for reimbursement from the Fund.

Unlike other types of Fund liability, the Fund has no right to litigate liability under K.S.A. 44-534a(b) for overpayment of benefits. *Wasson v. United Dominion Industries*, 266 Kan. 1012, 974 P.2d 578 (1999). The issues relating to what respondent owes a claimant are

litigated between respondent and claimant and if, after a full hearing on the claim, it is determined that respondent had overpaid, the Director certifies the amount of the overpayment to the Commissioner of Insurance. Reimbursement by the Fund is a ministerial act. But in this case, the proceedings between claimant and respondent were ended by the settlement.

Once this case was settled, respondent's only option was, and is, to apply to the Director for certification of overpayment, if any, under K.S.A. 44-534a(b). We note that in many instances the Act refers to action to be taken by the Director and the ALJ stands in the Director's stead. In this instance, the statute calls for certification by the Director and the practice is to make application for such certification to the Workers Compensation Director.

Since the ALJ did not have jurisdiction to enter an order relating to the questions of notice or accidental injury, the Board likewise has no jurisdiction over those issues. The Board, therefore, concludes that after the settlement the ALJ did not have authority to proceed with a determination of issues between respondent and claimant. The ruling by the ALJ should be set aside as void. The Board makes no ruling on whether the respondent has overpaid, makes no ruling on whether there has been a full hearing on the claim, and makes no finding on whether the Fund should reimburse respondent for amounts paid. Those issues should be addressed to the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of January 29, 1999, should be set aside. Respondent's application for reimbursement from the Fund is denied.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

Before the Workers Compensation Fund can be held liable for an overpayment, there must be (1) a full hearing on the claim and (2) a determination that there has been an

overpayment. Therefore, I agree with the majority that respondent's application for reimbursement should be denied. But, more importantly, I also believe that respondent is precluded from seeking from the Director certification of any overpayment.

The Workers Compensation Act specifically requires a full hearing to determine the amount of compensation due an injured worker before the respondent can seek reimbursement for overpayments from the Fund. The Act provides:

If compensation in the form of medical benefits or temporary total disability benefits has been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to an award entered under this section, and **upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, the employer and the employer's insurance carrier shall be reimbursed from the workers compensation fund . . .** for all amounts of compensation so paid which are in excess of the amount of compensation the employee is entitled to less any amount deducted from additional disability benefits due the employee pursuant to subsection (c) of K.S.A. 44-525 [the final award statute] . . . **as determined in the full hearing on the claim.** The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.¹ (Emphasis added.)

I find that neither the December 5, 1997 settlement hearing nor the September 9, 1998 hearing constitutes a "full hearing on the claim." That term, should it have any meaning at all, refers to more than a single hearing but to the entire litigation process culminating in the final award.

As claimant and the respondent settled this claim, they relinquished their right to a full hearing on the claim and circumvented a determination of the amount of benefits actually due the claimant. Because respondent forewent a full hearing and the adjudication of benefits, it is now precluded from seeking certification of an overpayment. Holding otherwise encourages collusion.

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
Marvin R. Appling, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

¹ K.S.A. 44-534a(b).